FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 4 1960
JAMES R. BROWNING, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES

**October Term, 1959**

**No. 835**

WYOMING CONSTRUCTION COMPANY, a Wyoming corporation; and MONOLITH PORTLAND MIDWEST COMPANY, a corporation,
Petitioners,

vs.

THE WESTERN CASUALTY AND SURETY COMPANY, a corporation; FORGEY CONSTRUCTION COMPANY, a Wyoming corporation; and ORRIN B. FORGEY, RUSSELL FORGEY, CHAS. S. CHAPIN and W. J. McNAMARA, individually and as co-partners doing business as FORGEY BROTHERS,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

**WILLIAM H. BROWN,**
512 Petroleum Building,
Casper, Wyoming,
**EDWARD E. MURANE,**
Wyoming National Bank Bldg.,
Casper, Wyoming,
**DONALD E. CHAPIN,**
First Nat'l Bank & Tower Bldg.,
Casper, Wyoming,
**Counsel for Respondents.**

EASTWOOD PRINTING CO. • 2854 LARIMER • DENVER 5, COLO.

## SUBJECT INDEX


| | PAGE |
|---|---|
| Statement of Case | 1 |
| Summary of Argument | 2 |
| Reasons for Not Granting the Writ | 4 |
| I. | |
| Wyoming Was Not Delayed by Any Default of Forgey | 4 |
| II. | |
| Western's Duty As Surety On Wyoming's Performance Bond | 8 |
| III. | |
| The Liability of Monolith | 12 |
| IV. | |
| The Applicable Statute of Limitations | 17 |
| V. | |
| Interest Was Properly Allowed On Western's Claim | 20 |
| Conclusion | 27 |


## TABLE OF AUTHORITIES CITED

### Cases


| | |
|---|---|
| American Surety Co. v. Carbon Timber Co., 263 Fed. 295 (8th Cir. 1919) | 25 |
| Binning v. Miller, 60 Wyo. 414, 146 P. 2d 257 (1944) | 22 |
| Costan v. Manila Electric Co., 24 F. 2d 383 (2d Cir. 1928) | 17 |
| Dawson, Corbett and Shelp v. Lieurance, 68 Wyo. 465, 237 P. 2d 457 (1951) | 22 |

## INDEX (CONTINUED)


| | PAGE |
|---|---|
| Fish v. East, 114 F. 2d 177 (10th Cir. 1940) | 13 |
| H.A.S. Loan Service v. McColgan, 21 Cal. 2d 551, 133 P. 2d 391, 145 A.L.R. 349 (1943) | 13 |
| Herman v. Mobile Homes Corp., 317 Mich. 233, 26 N.W. 2d 757 (1947) | 13 |
| Hughes v. Reed, 46 F. 2d 435 (10th Cir. 1931) | 19 |
| Industrial Research Corp. v. General Motors Corp., 29 F. 2d 623 (D.C.N. Ohio 1928) | 13 |
| Johnson v. Hanover Fire Ins. Co., 59 Wyo. 120, 137 P.2d 615 (1943) | 22 |
| Kuhn v. McKay, 7 Wyo. 42, 65 Pac. 853 (1897) | 23 |
| Leet v. Joder, 75 Wyo. 225, 295 P. 2d 733 (1956) | 26 |
| Taylor v. Standard Gas & Electric Co., 306 U.S. 307 (1939) | 13 |
| Wyoming Ry. Co. v. Leiter, 25 Wyo. 286, 169 Pac. 1 (1917) | 25 |


### STATUTES


| | |
|---|---|
| Federal Rules of Civil Procedure, Rule 49(b) | 1 |
| Wyoming Statutes, 1957, Section 13-479 | 26 |
| Wyoming Statutes, 1957, Section 1-16 | 19 |
| Wyoming Statutes, 1957, Section 1-17 | 19 |
| Wyoming Statutes, 1957, Section 1-21 | 19 |


### TEXTS


| | |
|---|---|
| 4 Am. Jur., Limitation of Actions, Section 79 | 19 |
| 51 C.J.S., Limitations of Actions, Section 33 | 19 |

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1959

---

No. 835

---

WYOMING CONSTRUCTION COMPANY, a Wyoming corporation; and MONOLITH PORTLAND MIDWEST COMPANY, a corporation,

Petitioners,

vs.

THE WESTERN CASUALTY AND SURETY COMPANY, a corporation; FORGEY CONSTRUCTION COMPANY, a Wyoming corporation; and ORRIN B. FORGEY, RUSSELL FORGEY, CHAS. S. CHAPIN and W. J. McNAMARA, individually and as co-partners doing business as FORGEY BROTHERS,

Respondents.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

---

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

---

## STATEMENT OF CASE

Respondents adopt as their "Statement of the Case," the statement at the beginning of the opinion of the United States Court of Appeals for the Tenth Circuit. See pages 1 and 2 of Appendix I of Petition.

Insofar as the "Statement" appearing on pages 4 through 6 of the petition purports to be a statement of the case containing the facts material to the consideration of the questions presented it is controverted by these Re-

spondents. The facts which are the subject of the statement are not presented in the true light. The statement of "Questions Presented" on pages 2 and 3 of the petition is subject to the same criticism. Certain facts are assumed in various of the questions which were not found to be true by the jury in the trial of the case. Other facts are given an undue emphasis and are not presented within the framework in which they actually existed.

Statements of facts which Respondents deem necessary to correct inaccuracies and omissions in the statement of petitioners, together with a statement of such facts as are necessary to correct misapprehensions that might result as a consequence of the outline of questions presented submitted by petitioners will hereinafter appear, where appropriate, in the argument of Respondents.

## SUMMARY OF ARGUMENT

Respondents will hereinafter demonstrate that Petitioners are attempting to secure a review of adverse factual determinations made by a jury and reviewed by the United States Circuit Court of Appeals for the Tenth Circuit. The petition presents no substantial questions of law.

Wyoming Construction Company, hereinafter referred to as "Wyoming," was not delayed in the performance of its subcontract by any default of Forgey Construction Company, hereinafter referred to as "Forgey." A work site was at all material times available to Wyoming. Wyoming's failure to keep abreast of Forgey in the performance of its obligations under its subcontract was the result of its own acts. The jury found as a fact that Forgey did not delay, obstruct, hinder, interfere or prevent Wyoming from performing. Substantial evidence supports the verdict and the judgment thereon.

Western Casualty and Surety Company, hereinafter referred to as "Western" acted in complete good faith in its relationship with Wyoming. It gave Wyoming every opportunity to perform its contract, but was forced by the default of Wyoming to perform Wyoming's obligations. As a consequence of this performance, Western became entitled to enforce its contractual right of indemnity. Wyoming cannot take advantage of its own wrong by asserting that Western waived a purported defense and thus that Western lost its right to indemnity. The Petitioners' contentions in these respects were resolved adversely to them by the jury. Substantial evidence in the record supports the jury's verdict.

Monolith Portland Midwest Company, hereinafter referred to as "Monolith," acquired ownership of Wyoming during the course of the construction job. By its exercise of dominion and control over Wyoming in its own interest and to the detriment of Wyoming, Forgey and Western, Monolith became liable for Wyoming's contractual obligations. The question of whether Monolith's conduct was such as to render it liable for Wyoming's obligations is a question of fact. This question has been determined in Western's favor by the trier of fact. The determination is supported by substantial evidence in the record.

Western brought suit on a written contract of indemnity. Monolith was joined as a defendant on the theory that, by its conduct, it became liable on the contract of indemnity. Western does not seek to hold Monolith liable on a theory of tort liability. Western's claim against Monolith was asserted well within the time allowed by the statutes of limitation applicable in actions based on a contract, either express or implied.

Western's claim for indemnity was liquidated. Under

the applicable local statute, interest before judgment is recoverable as a matter of law upon liquidated claims. The action of the trial court in allowing interest upon Western's liquidated claim was proper in all respects.

## REASONS FOR NOT GRANTING THE WRIT

### I.

### Wyoming Was Not Delayed By Any Default of Forgey

It has been the contention of Petitioners from the trial of this case, through the Circuit Court of Appeals, and in this petition that November 29, 1951, was the operative completion date of the subcontract between Forgey and Wyoming. This is not the case. In accordance with the principal contract between S. J. Groves & Sons Company and the United States, the subcontract whereby Forgey contracted to do the embankment and riprap work, and the subcontract whereby Wyoming contracted with Forgey to do the riprap work called originally for completion by November 29, 1951 (R. 39). Several provisions were contained in the principal contract itself, however, which recognized circumstances that would result in extensions of time being given (R. 898-902). The Forgey-Wyoming subcontract incorporated and adopted all consistent provisions of the principal contract (R. 37 & 38). Various extensions of time were procured from the Bureau of Reclamation, the last of which expired on July 17, 1952 (R. 842-844). These extensions of time were procured with the assistance and cooperation of all parties concerned, including Wyoming and Western (R. 399, 539 & 540, 601, 718, 720, 825-833, 859-862, 967 & 968, 1027 & 1028). Thus the subcontract completion date became July 17, 1952, not November 29, 1951, as contended by Petitioners.

Forgey served notice upon Wyoming on June 27, 1952,

of Wyoming's default under its subcontract (R. 308 & 309). Until this time the Forgey-Wyoming subcontract continued in force for the benefit of both parties.

At the time the subcontract was executed on or about December 5, 1950, (R. 525), representatives of both Wyoming and Forgey recognized that there was a distinct possibility that the embankment and riprap might not be completed by November 29, 1951, and that extensions of time might have to be procured (R. 740). At its own instance, and with the concurrence of Forgey, Wyoming continued performance under its subcontract on and after November 29, 1951, through the winter of 1951-1952 and into the spring and summer of 1952 (R. 409 & 410, 720, 810, 829-833, 847). This continued performance was an attempt by Wyoming to fulfill its contractual obligations and became necessary as a consequence of Wyoming's own acts.

From the time of negotiation of the Forgey-Wyoming subcontract, the parties contemplated that Wyoming would place riprap on the dam embankment concurrently with the raising of the embankment by Forgey (R. 528, 704 & 705, 744, 804). By the end of July, 1951, Forgey had completed a substantial portion of the embankment and an area was available to Wyoming for the placement of riprap (R. 464-466, 806). A substantially increased amount of slope was available to Wyoming by the end of August, 1951 (R. 799 & 800). During May and June of 1951, Wyoming was repeatedly requested by Forgey to commence preparatory work under its subcontract (R. 632, 806), but such work was not commenced by Wyoming until July of 1951 (R. 568, 806). It was not until August of 1951 that Wyoming opened a road to the quarry from which it was required to procure riprap materials (R. 573, 681, 799). The respective performances of Forgey and

Wyoming are well summarized in the testimony of one of Wyoming's own employees (R. 799-803, 821-823).

On August 31, 1951, Forgey had placed 61% of the embankment materials (Wyoming had placed only .08% of the riprap). Respective percentages of completion for the last day of each of the following months were: September 30, 1951—Forgey 75%, Wyoming 4.5%; October 31, 1951—Forgey 91%, Wyoming 3.8% (R. 340 & 341). On November 30, 1951, Forgey was 93% completed in placing embankment materials; Wyoming was 9.9% completed with the placement of riprap materials (R. 341). Shortly before this date, Forgey had closed down its operation of placing embankment due to freezing conditions which made it impossible to saturate and compact materials in the embankment as required by specifications (R. 687). At its own election, Wyoming continued performance after this date (R. 409 & 410, 615 & 616, 740 & 741, 810 & 811).

Wyoming's failure to keep abreast of Forgey in the performance of the respective obligations of the parties was due to several reasons, among which were: Wyoming's late start in commencing preparatory work (R. 568, 590, 681), lack of adequate equipment (R. 565 & 566, 569 & 570, 591, 597 & 598, 802, 860), inadequate operating capital (R. 741, 765-767) and the expressed desire of the president of Wyoming to work into the winter rather than to pull Wyoming equipment off more profitable jobs (R. 740 & 741).

The president of Wyoming was himself of the opinion that placement of blanket and riprap would proceed more efficiently at a time when the materials in the embankment were frozen (R. 801). Western, Wyoming's surety, knew and approved of Wyoming's plan to continue performance into the winter (R. 409 & 410, 412, 861). Wyo-

ming continued performance under its contract until the middle of June, 1952 (R. 692 & 822 & 823, 834). At this time Wyoming was 43.8% complete with its obligation to place blanket and riprap (R. 638). Forgey had previously finished placement of the embankment materials on May 10, 1952 (R. 838). As above mentioned, Forgey gave notice of default to Wyoming on June 27, 1952, Wyoming having ceased performance under its contract about the middle of June.

Prior to submission of the cause to the jury, the trial court gave two special interrogatories to the jury under Rule 49(b) of the Federal Rules of Civil Procedure. One of these interrogatories is quoted as follows:

> "Did Forgey Construction Company (and the individual third party defendants) . . . obstruct, hinder, interfere or prevent Wyoming Construction Company from laying the blanket and riprap on said dam pursuant to its contract?" (See page 18 of Appendix to Petition.)

The jury, with the evidentiary background discussed above, answered this question in the negative. The evidence supported the jury's determination that Wyoming failed to keep the contemplated pace, failed to correlate its work with Forgey and failed to follow agreed procedures. As determined by the jury, Wyoming was itself at fault, while Forgey was not. The Circuit Court of Appeals for the Tenth Circuit reviewed this evidence when the contention was made by Petitioners that Wyoming was excused from performance of its subcontract because of the alleged breach by Forgey in failing to complete precedent embankment work by November 29, 1951. These contentions were succeintly disposed of by that Court, Justice Breitenstein stating:

> "The record shows that no failure of Forgey to complete the preliminary work hindered or delayed Wyoming and that Wyoming made no effort to keep up with the progress of Forgey. These facts, coupled with extensions of the termination date obtained with the assistance and acquiescence of Wyoming, require the conclusion that no default of Forgey relieved Wyoming of its duty to perform. The situation in which Wyoming found itself was the result of its own acts." (Page 4 of Appendix to Petition.)

It is conceded that a contractor is entitled to a full opportunity to perform his contract and that a materially different performance cannot be imposed upon him, as argued by Petitioners. See page 8 of Petition. In this case, there is no factual basis for the application of this principle. The holding of the United States Circuit Court of Appeals for the Tenth Circuit is in full accord with applicable authorities. There is no conflict whatsoever with the decision of any court on a parallel set of facts.

## II.

## Western's Duty As Surety On Wyoming's Performance Bond

Petitioners argue that it was obligatory upon Western, as Wyoming's surety, to cause Wyoming, its principal, to cease performance on its contract as of December 1, 1951. Petitioners then argue that "Western's subsequent loss was directly and proximately caused by its failure to assert a known, valid defense on December 1, 1951, knowing the probable consequences." See Page 9 of Petition. This argument completely ignores the evidence in the case and erroneously assumes that a defense existed as of that date which would exonerate Western as surety and excuse nonperformance by Wyoming.

As above demonstrated, no fault on the part of Forgey contributed to the failure of Wyoming to maintain a rate of production which would have enabled it to keep abreast of Forgey in the progress of the work. It was due to Wyoming's own acts that Wyoming was so far behind as of December 1, 1951, that continued performance into the winter was indicated by good business practice. It was Wyoming's own idea to continue performance into the winter; it communicated this plan to Western, its bonding company, and secured the latter's approval.

Western took the course of action which would have been taken by any surety in the same circumstances. It did all in its power to assist Wyoming in the further performance of its contractual obligation. No "valid defense" existed in either Western or Wyoming as of December 1, 1951. Moreover, if such a defense existed, it was known to Wyoming and could have been asserted by Wyoming. Instead, Wyoming desired to work later into the winter for its own benefit, and elected to continue performance of its own free will.

The instant case is not an action by the beneficiary or obligee under a bond against the principal's surety. Rather, this action was by the surety which performed in the place of its principal seeking to enforce against the principal a contractual right of indemnity. The contract of indemnity in question authorized Western, as surety, ". . . to consent, from time to time, to any extensions, modifications, changes or alterations of, or additions to, said contract . . ." (R. 24). Western thus had the contractual right to consent to an extended time of performance particularly when such extension inured to the benefit of Wyoming, its principal.

The only remaining assertion of Petitioners in Point II

of their argument which merits comment is the charge contained therein that the issue of the presence or absence of "good faith" on the part of Western was withdrawn from the jury by the trial court. This is not true. By rendering a general verdict in favor of Western and against Wyoming and Monolith, the jury, under appropriate instructions (R. 141-143, 148, 876 & 877, 880) found that Western acted in good faith at all times. This issue unquestionably remained in the case, despite Petitioner's continued contention that the issue was withdrawn as a consequence of the submission of two special interrogatories to the jury (R. 137, page 18 of Appendix to Petition). These interrogatories were given under and by authority of Rule 49(b) of the Federal Rules of Civil Procedure. The answers given by the jury thereto were consistent with each other and consistent with the general verdict. By express provision in the Rule, interrogatories need not be given on every issue in the case. Accordingly, there is no error whatever in submitting interrogatories on some but not all of the issues of fact present in a case. Moreover, Petitioners are in no position to assert that the giving of these interrogatories was error. The interrogatories exemplified the precise issues upon which the defendants below sought to make out a defense and were a proper statement of the more important issues in the case. Counsel for Petitioners was aware of the "general substance" of what was to be contained in the interrogatories substantially in advance of the time that they were given (R. 894 & 895). Had counsel desired to make objections, suggest changes, or submit additional interrogatories on other issues, this could have been done. Not having done so, any error was waived.

In their appeal to the Circuit Court of Appeals, Petitioners raised the same argument as is contained in Point

II of the petition. In disposing of these arguments, and after examining voluminous evidence, the issues were resolved adversely to Petitioners, Judge Breitenstein stating with respect thereto that:

> "The equities of the situation cry out against Wyoming. By starting late and using inadequate equipment it failed to keep abreast with the progress of Forgey. It led all parties to believe that by winter work it would catch up with Forgey and complete the riprap promptly after the completion of the embankment. It did not object to the extensions but instead aided in their procurement. It failed to do the job it had contracted to do. Now, after the work has been completed by its surety and the surety seeks indemnity, Wyoming asserts that the situation which resulted from its wrong relieves it of liability to its surety. Such argument does not commend itself to the court. A party may not take advantage of its own wrong.
>
> "* * *
>
> "Wyoming further says that Western breached its duty to act in good faith. We have no doubt that a surety must act in good faith in its dealings with its principal. In the situation here, Wyoming knew the facts at least as well as its surety. The legal rights and obligations arising from those facts were known to both. There is no evidence of misrepresentation, concealment, overreaching or undue persuasion on the part of Western. To the contrary, Western acted with candor and patience and gave Wyoming every opportunity to perform its contract." (Pages 6 and 7 of Appendix to Petition.)

As with Point I of the petition, the resolution of the

questions raised in Point II depended upon a determination of facts. These facts were passed upon by a jury in the trial court and were reviewed by the Court of Appeals. In both instances, these factual issues were resolved adversely to the present Petitioners.

## III.

## The Liability of Monolith

In arguing that Monolith was improperly held responsible for Wyoming's contractual obligation of indemnity, Petitioners again ignore factual determinations made by a jury and reviewed by the Court of Appeals. Petitioners again indulge in factual assumptions contrary to the true facts as shown by the record.

Petitioners argue that Wyoming was financially responsible. The only competent evidence introduced in the trial indicates the contrary (R. 275, 577, 593-595, 621-623, 636, 725 & 726, 737 & 738, 741, 765-767, 796-798, 813, 834, 837, 851 & 852, 916 & 917, 1006 & 1007). No evidence was introduced which would indicate that Wyoming was financially responsible to the extent necessary to satisfy its obligation of indemnity, either at the time when the obligation first accrued or at any subsequent time.

Petitioners contend that it was undisputed at the trial of this case that Monolith was free from "fraud or wrong doing." See page 11 of Petition. This contention is contrary to the record. No showing of actual fraud, as such, was made by plaintiff Western at the trial. There was a showing, however, of such conduct on the part of Monolith as would justify application of the instrumentality theory, hereinafter referred to. No concession was ever made that Monolith was guilty of no wrongdoing whatever.

Evidence in the record sustains the propriety of the

jury's verdict in favor of Western and against Monolith under the instrumentality theory described by the Supreme Court of the United States as not properly a rule

> "... but a convenient way of designating the application in particular circumstances of the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice." *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 322.

The applicability of this theory is a question within the province of the trier of fact. See *H.A.S. Loan Service v. McColgan*, 21 Cal. 2d 551, 133 P. 2d 391, 145 A.L.R. 349; *Herman v. Mobile Homes Corporation*, 317 Mich. 233, 26 N.W. 2d 757; *Industrial Research Corp. v. General Motors Corporation*, 29 F. 2d 623 (D.C. N.D. Ohio); *Fish v. East*, 114 F. 2d 177 (10th Cir.); *Costan v. Manila Electric Co.*, 24 F. 2d 383 (2d Cir.).

The following is a summary of the more important evidentiary matters relevant to the issue. At the time that Wyoming entered into the sub-contract with Forgey, one Joe Wheeler was the president of Wyoming. He and his wife were the owners of substantially all the capital stock of Wyoming (R. 522-523, 594). At this time and at all subsequent times there was a very close community of interest between Wyoming and Monolith, Wyoming deriving a large portion of its income from operations conducted for the benefit of Monolith (R. 410 & 411, 442, 521 & 522, 861). Monolith was dependent for its gypsum supply in its Laramie operation upon supplies controlled by Wyoming (R. 493 & 494, 509 & 510). A substantial portion of the equipment owned by Wyoming remained dedicated to Monolith's operation in Laramie although the same was

needed upon the riprap job (R. 509, 515-517, 568-570, 591 & 592). In the winter of 1952 Monolith loaned Wyoming $25,000.00, which loan Wheeler, the president of Wyoming, considered to be an initial advance on a $75,000.00 open line of credit (R. 594). As a part of this transaction, and at the direction and insistence of Monolith, Wyoming completely surrendered its power to conduct its own business without the prior consent and approval of Monolith (R. 414-417, 915-917). All Wyoming stock was pledged to Monolith as security for the advance, with a right to repurchase on payment of outstanding loans, which right was never exercised (R. 593-595, 617, 619-623, 914-918). Wheeler continued as president of Wyoming until May of 1952 but his efforts to complete the Forgey contract were completely frustrated by Monolith (R. 276-278, 605, 617-625, 637 & 638, 1031). Although the initial $25,000.00 loan was considered by Wheeler to be an advance on an open line of credit, Monolith refused any further assistance (R. 593-595, 619-623). Wheeler was prevented from securing outside financing by restrictions placed upon Wyoming's borrowing capacity at the time of the initial loan, except with the consent and approval of Monolith (R. 417, 912 & 913). In effect, Monolith secured 100% stock ownership of Wyoming by advancing only $25,000.00 in return for which a pledge of Wyoming's stock was exacted (R. 593-595, 619-623, 914, 918).

After Wheeler's resignation had been forced by Monolith, a Monolith employee took over the actual supervision of Wyoming's activities (R. 470, 605). This person assured Forgey and Western that Monolith would either take over Wyoming's contract or would supply financial backing for Wyoming to complete the job (R. 470 & 471, 798, 911). These representations never materialized. Instead, about the middle of June, 1952, this employee of Monolith

shut down the job and caused Wyomfug's equipment to be "stacked" (R. 451, 479, 692 & 693, 759-762, 822 & 823, 834). On June 16, 1952, this same employee was elected as vice-president of Wyoming and was appointed as general manager with full power to rescind any act or contract of the officers, agents and employees of Wyoming (R. 926). Representations were again made that Monolith would complete Wyoming's contract or assist Wyoming in its completion (R. 284, 309 & 310). Again, these representations failed to materialize. As a consequence, and while the job was still shut down, Forgey gave Wyoming notice of default on June 27, 1952 (R. 308-311) and called upon Western to perform on Wyoming's bond (R. 310 & 311). Western called upon Wyoming for exoneration (R. 285) but was able to induce no further action other than continuing assurance that Monolith was still considering taking over the job (R. 837 & 838). On July 14, 1952, a meeting was held for the purpose of determining who was to prosecute the contract to completion (R. 285 & 286, 734). Representatives of all interested parties, including representatives of Forgey, Western, Wyoming, Monolith and the Bureau of Reclamation attended the meeting. At this meeting, Monolith refused to guarantee Wyoming's performance of its contract. A Monolith executive, not in attendance at the meeting, when contacted by telephone refused to authorize a commitment by Wyoming for Wyoming to complete its contract (R. 287, 772 & 773, 779-781). Another executive of Monolith, in attendance at the meeting, demanded that penalties be waived as a condition to either Wyoming or Monolith commiting themselves to complete the job (R. 781). Neither of these last two mentioned executives were officers or directors of Wyoming. On July 15, 1952, a Monolith employee again contacted a representative of Western, acknowledging that Wyoming-Mono-

lith had been "off-base" in demanding a waiver of penalties. An offer was made to commit Wyoming to complete the job if Western would advance the necessary cash (R. 850-852). The offer was refused, and Western completed the job.

The facts show a clear detriment to Western. Wyoming was denied the opportunity to complete its own contract. The job could have been finished by July 17, 1952, the ultimate contract completion date, had Wyoming been allowed to proceed unhampered with its performance during the spring and early summer of 1952. As it was, Western was forced to complete the contract during the season remaining after mid-July at a cost of $74,677.33. Penalties at the rate of $250.00 per day were assessed by the Bureau of Reclamation from July 17, 1952, to the October date when Western completed the contract (R. 295, 342, 336). Respondents submit that costs incurred in the amount of $74,677.33 as a result of being forced to complete Wyoming's contract is certainly a detriment and is without a doubt the proximate result of Monolith's conduct in refusing authorization for Wyoming to complete its contract.

The facts are ample to justify the conclusion that Monolith exercised its means of dominion and control over Wyoming for its own benefit and in its own interest and to the detriment of Western, Forgey and Wyoming. Wyoming is wholly owned by Monolith. Had Monolith (and Wyoming) sustained their defense in the trial court, this ownership would be free and clear of contractual obligations incurred by Wyoming and accruing to Western as a direct result of the conduct of Monolith. When Monolith elected to pursue the course that it did, it was chargeable with the possible consequences. As so aptly stated by Justice Breitenstein:

"The assumption of ownership and control of Wyoming was to the advantage of Monolith because of the gypsum contract which Monolith had made 'through desperation' when it lost its prior source of supply and which was profitable to Wyoming. The decision to proceed no further with the Forgey contract was a detriment to Western as it was obligated under its performance bond. The facts justify the conclusion that Monolith was using Western (sic "Wyoming") and its property to the sole advantage of Monolith. That advantage was served by the abandonment of the Forgey contract.

"Monolith emphasizes that there was no evidence of fraud but it is enough if the disregard of the corporate entity is required to prevent injustice. The issue was submitted to the jury under instructions, which, when taken as a whole and considered in their entirety, fairly and adequately set out the controlling principles. There was substantial evidence from which the jury could find that Monolith controlled and dominated Wyoming in the interest of Monolith and with full knowledge of the situation caused Wyoming to default on the Forgey contract with resulting detriment to Western. The verdict of the jury is sustained. It would be inequitable and unjust to permit Monolith to escape the consequences of its conduct." (Pages 10 & 11 of Appendix to Petition.)

## IV.

## The Applicable Statute of Limitations

Petitioners are in error in asserting that the amended complaint joining Monolith as a party defendant was ordered filed ex parte. Actually, by written motion served on counsel for Petitioner herein, Western moved on Octo-

ber 18, 1957, for permission to file an amended complaint for the purpose of adding Monolith as a defendant (R. 87-89). This motion was filed October 21, 1957 (R. 89). By their own admission, Monolith's counsel received the notice of motion but elected not to present argument (R. 108 & 109). The motion was heard on October 29, 1957, and an order, dated and filed the 29th of October, 1957, authorized the filing of the amended complaint. Subsequently an amendment was filed to the amended complaint, said last amendment being filed November 26, 1957, (R. 128, 130) and served upon counsel for Monolith - Wyoming at that time. These amendments were found to be necessary in furtherance of justice.

The amended complaint, together with the amendment to it pleaded facts sufficient to state a claim for relief on the ground that separate corporate entities will be disregarded where a parent corporation dominates and controls a subsidiary in its own interest and to the detriment of the subsidiary and third parties to the extent that recognition of distinct entities would result in wrong or injustice (R. 93, 94, 128-130).

In arguing throughout this case that Western's claim for relief is barred by the statute of limitations, petitioners have persistently refused to recognize that Western's claim is not founded upon a theory of tort liability. It was alleged in Western's complaint that Monolith had acted fraudulently, but this allegation was made only in conjunction with other specific allegations ample, if proved, to show a right to relief upon the ground that by its conduct Monolith became responsible for its wholly owned subsidiary's contractual obligations. The judgment in favor of Western and against Monolith rests upon this ground.

A standard general indemnity contract was executed

by Wyoming at the time Western became surety upon Wyoming's performance bond (R. 23-27). Western, as surety, became obligated to perform under this bond upon the default of Wyoming. Through its exercise of dominion and control over Wyoming in its own interest, to the detriment of Wyoming, Forgey, and Western, Monolith became liable on this same contract under the instrumentality theory. The amended complaint, and the amendment thereto, filed October 29, 1957, and November 26, 1957, respectively, were timely under the applicable statutes of limitation. Western's claim for relief did not accrue until it had performed as surety under the performance bond. This performance was commenced only after July 14, 1952, and was not completed until October of 1952. Under Wyoming statutes, an action may be brought on a written contract within ten years after the cause of action accrues. Section 1-46 *Wyoming Statutes*, 1957. On oral contracts, either express or implied, an 8-year statute applies. Section 1-17, *Wyoming Statutes*, 1957. On actions for relief not otherwise limited, a ten year statute applies. Section 1-21, *Wyoming Statutes*, 1957. Clearly, this action was founded upon a contractual theory of liability and not upon a theory of liability in tort. Where there is doubt in this respect, courts universally apply the longer period of limitations applicable in actions founded upon a contract. See e.g. *Hughes v. Reed*, 46 F. 2d 435 (10th Circuit); 34 Am. Jur. *Limitation of Actions*, Section 79; 53 C.J.S. *Limitations of Actions*, Section 33. The decision of the Circuit Court of Appeals affirming the trial court on this point is consistent with all authorities upon the subject.

## V.

## Interest Was Properly Allowed Upon Western's Claim

In its original complaint, Western set out a claim for $74,677.29 (R. 13). The prayer of the original complaint was for only $74,667.29, as was the prayer in the subsequent amended complaint (R. 13, 94). This discrepancy was the result of typographical error. The actual and the exact claim of Western was for $74,677.33 (R. 378). In his closing argument, Western's counsel requested the jury to render a verdict in favor of Western in the amount of $74,677.33 (R. 873). The jury rendered a verdict in this precise amount (R. 137). The discrepancies in the pleadings were not brought to the attention of the jury since the pleadings were not made available to them on their retiring (R. 889). Petitioners now seek to take advantage of these discrepancies by asserting that the jury's verdict differed from both the "claim" on which interest was allowed, and the prayer. Page 15 of Petition. This assertion is founded upon circumstances so inconsequential as not to require further comment.

Under and by authority of Section 13-479, *Wyoming Statutes*, 1957, the trial court gave judgment for interest at the statutory rate of 7% per annum upon the verdict of the jury, as prayed for in the amended complaint (R. 94). Section 13-479 is quoted as follows:

> "On money due on any instrument in writing, in the absence of contract specifying the rate, or on settlement of an account from the day balance shall be agreed upon; on money received to the use of another, and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due, and withheld by unreasonable delay of payment, interest shall be allowed at the rate of seven

per cent, per annum. Unsettled accounts shall bear interest after thirty days from the date of the last item thereof."

Contrary to statements of counsel in the petition, the action of the trial court in giving judgment for the amount of the verdict plus interest was not ex parte. Actually, the trial court called for memorandum briefs on the interest question and Petitioners filed their brief, entitled "Memorandum re Interest" on December 19, 1957. Only after the parties were heard through their briefs did the court decide the question and grant judgment for plaintiff on this issue. The memorandum of the trial court advising of the decision, addressed to all attorneys of record, was dated December 23, 1957, the date the judgment was filed herein. See pages 19 through 23 of Appendix to Petition. The charge that the trial court acted ex parte is without foundation.

As indicated above, the jury's verdict was for the precise amount of Western's claim. The form of verdict presented to the jury contained no reference to interest (R. 137). Neither party requested an instruction on the matter of interest.

This action was an action for money due on an instrument in writing. Under the terms of the contractor's general indemnity executed by Wyoming, Wyoming was obligated to indemnify Western against all loss, costs, damages, attorney's fees and expenses of whatever kind or nature which might have been incurred by Western in good faith as a consequence of a default by Wyoming (R. 23-26). Where the terms of such a written contract furnish the measure of responsibility, a claimant is clearly entitled to interest on the amount of his claim under and by virtue of Section 13-479, supra.

Petitioners attempt to show that the action of the trial court, affirmed by the Court of Appeals, is in conflict with applicable Wyoming authorities. There is no conflict. Petitioners cite and rely upon various Wyoming Supreme Court decisions holding that a claimant is not entitled to interest, within the terms of the statute quoted above, where the claim is *unliquidated*. See *Dawson, Corbett & Shelp v. Lieurance*, 68 Wyo. 465, 235 P. 2d 457; *Binning v. Miller*, 60 Wyo. 114, 146 P. 2d 257; *Johnson v. Hanover Fire Ins. Co.*, 59 Wyo. 120, 137 P. 2d 615. The one fundamental distinction between these cases and the present case is that the claim in this case is liquidated. The *Dawson* decision is illustrative of this distinction. It concerned an action for an accounting between a contractor and his subcontractor, in which each party asserted monetary claims against the other. Issues were present with respect to the actual terms of the governing contracts, as well as with respect to the rights of the parties thereunder. The testimony addressed by the parties was irreconcilable and conflicting. As stated by the Wyoming Supreme Court on page 485 of the official report:

> "The litigation before us is really an accounting action involving mutual claims for *unliquidated* damages and items which were sharply disputed by both parties which neither would concede as due from one to the other and which required evidence to be submitted and the determination of the District Court had before it was established as certain what was due from one to the other. Under such circumstances and under the authorities to which we now call attention we think interest amounts were, as indicated above, erroneously allowed to plaintiffs." (Emphasis supplied)

The Wyoming Supreme Court in the *Dawson* case reviewed various authorities in support of their conclusion

that the claim of plaintiff had been unliquidated. It was indicated in the opinion that the test of whether a claim is liquidated, as opposed to unliquidated, is whether the claim is of such a fixed and determinate amount that payment thereof can be tendered and the running of interest thereby stopped. Decisions to the effect that a debt is deemed liquidated when it is certain how much is due and when it is due were cited with approval. See also *Kuhn v. McKay*, 7 Wyo. 42, 65 Pac. 853, on the same points.

Petitioners cannot in good faith argue that they did not know the amount of Western's claim as of January 23, 1953, since Western furnished a detailed and comprehensive accounting of its claim against Wyoming on that date (R. 359, 373 & 374, Exhibit 7).

This voucher contained a complete account of Western's expenses in completing Wyoming's contract, including full details with regard to expenditures and receipts (R. 290, 373 & 374). The total loss figure shown in the exhibit was $82,228.81.

Wyoming-Monolith made no protest as to the reasonableness of the expenses incurred by Western, as evidenced by the voucher. Instead, Western was notified that Wyoming considered itself free from liability for indemnity and that Wyoming intended to maintain the position it had assumed on July 17, 1952, i.e., that Western had arbitrarily taken over Wyoming's contract and that Wyoming was not liable for indemnity (R. 305, 360).

Monolith retained independent accountants and auditors to review Western's records in support of the amounts included in Exhibit 7 (R. 937-950). The resulting report was submitted to an executive of Monolith on March 31, 1953 (R. 937). The report contained the statement that the net job cost (as opposed to the total loss figure shown

in Exhibit 7 of $82,228.81) as of February 23, 1953, was $79,691.26. Miscellaneous adjustments due to occurrences taking place after the voucher was submitted account for the difference in the two figures. Subsequent adjustments (matters of mathematical computation only) reduced Western's loss figure to $74,677.33. These adjustments (e.g. R. 380) were largely consequent upon a successful effort by Western to obtain rebates on part of the penalties which had been assessed. This took place after the submission of Exhibit 7 and was therefore not reflected therein. The rebate of penalties and other miscellaneous adjustments inured to the benefit of Wyoming and Monolith since the total amount of the claim was thereby reduced.

From and after January 23, 1953, the present Petitioners were possessed of knowledge of the exact amount of Western's claim, computed precisely in accordance with the terms of the written contract of indemnity. The petitioners are in no position to complain that the ultimate loss figure, through the efforts of Western, was reduced from $82,228.81 to $74,677.33. Had the present petitioners paid or tendered payment of Western's loss in accordance with the voucher submitted on January 23, 1953, the running of interest would have been stopped. The petitioners then could have taken such action as they desired in processing negotiations and prosecuting claims which resulted in favorable adjustments. Instead, Wyoming at the behest of Monolith, continued to claim that Western had arbitrarily taken over Wyoming's contract and that Wyoming had a complete defense to Western's claim for indemnity (R. 324-339).

Again contrary to Petitioners present argument, neither Monolith nor Wyoming ever questioned the amount of Western's expenditures, nor did these parties introduce

any evidence showing that Western had not actually expended the amounts which it claims to have expended. It was not until after suit was filed that the reasonableness of the expenditures was attacked, and then only in conjunction with the primary defense that there existed no liability for indemnity. As above indicated, these Petitioners had always maintained that a complete defense existed to Western's claim. The belated attack upon the reasonableness of Western's unquestioned expenditures was and is not well founded, since Western had the right under its contract of indemnity to recover all amounts expended by it in good faith. The jury, by its general verdict in favor of Western, found that Western had at all times acted in good faith.

Petitioners' contentions throughout the trial of the case, and in arguing the appeal to the Circuit Court, to the effect that Western had no right of indemnity does not make Western's claim unliquidated. As held by the Tenth Circuit Court of Appeals, the fact that a claim is disputed does not preclude the recovery of interest. This conclusion finds support in a decision of the Supreme Court of Wyoming, that of *Wyoming Ry. Co. v. Leiter*, 25 Wyo. 286, 291, 169 Pac. 1, in which case the Court made the observation:

> "The argument amounts to this: that plaintiff could not pay because it did not know the amount due for the reason that it objected to the amount found due. A very handsome method of avoiding the payment of interest on one's debts."

The decision allowing interest on the judgment in this case is consistent with the governing statute, construed in accordance with local decisions. The decision also parallels that rendered in *American Surety Co. v. Carbon Timber Co.*, 263 Fed. 295 (8th Cir.), which also involved a con-

struction of the same Wyoming statute on interest. The action was also by a surety against its principal for indemnity, the surety having performed on the default of its principal. The trial court had disallowed interest prior to judgment and was reversed in this respect by the Court of Appeals. The argument had been made that the plaintiff's claim was unliquidated and therefore not within the purview of the Wyoming statute. The Court of Appeals (at a time when the District of Wyoming was within the Eighth Circuit) in disposing of this question held:

> "The amount was ascertained under and by virtue of specific authority of the terms of the contract entered into between the Surety Company and the Timber Company, and, having been definitely ascertained, was paid by the plaintiff. This is undisputed. It follows that the amount so paid by the plaintiff to the United States was then due from the defendant to the plaintiff. It required no act of either plaintiff or defendant Timber Company to make the amount due definite and certain, and the time that it became due was the time of payment by plaintiff. Certainly, therefore, it was a liquidated debt."

The only inhibition placed upon the power of a court to add interest to a verdict, as expressed in *Leet v. Joder*, 75 Wyo. 225, 295, P. 2d 733, is that a court may not add interest where the same is a part of the damages or where it is impossible to ascertain whether the jury has included interest in the award on an unliquidated contract or claim. As held by the Circuit Court of Appeals, the present action does not come within either inhibition. The right to interest followed here as a matter of law, there being no question of fact involved. Interest was properly allowed by the trial court.

## CONCLUSION

The primary issues in this case are issues of fact. These issues were determined adversely to Petitioners by a general verdict of a jury in favor of Respondents and against Petitioners, upon which judgment was entered. Evidence in support of the jury's verdict was examined by the United States Court of Appeals for the Tenth Circuit. The verdict of the jury was found to be sustained in all respects and the judgment entered thereon was affirmed. The petition raises no substantial question in view of the evidence in the record.

The judgment is in complete accord with the local law applicable to parallel facts. The decision of the United States Court of Appeals for the Tenth Circuit is in full accord with its own previous decisions and with the decisions of other Courts of Appeal on the same matters. There are no special or important reasons for granting review on certiorari.

For the foregoing reasons, Respondents respectfully request that this petition for a writ of certiorari be denied.

Respectfully submitted,

WILLIAM H. BROWN
EDWARD E. MURANE
DONALD E. CHAPIN

*Counsel for Respondents.*